

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL MAYER,

Defendant.

No. CR 09-4051-MWB

**INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

INSTRUCTION NO. 1 - INTRODUCTION

Congratulations on your selection as a juror! These Instructions are to help you better understand the trial and your role in it. You must follow these instructions, and any other written or oral instructions that I give you during the trial, whether you agree with them or not.

In an Indictment, a Grand Jury has charged defendant Michael Mayer with “sexual exploitation of a child.” An Indictment is simply an accusation—it is not evidence of anything. Michael Mayer has pled not guilty, and he is presumed to be absolutely not guilty unless and until the prosecution proves his guilt beyond a reasonable doubt.

You must decide during your deliberations whether or not the prosecution has proved the guilt of the defendant beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, or stereotypes. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

Remember, only defendant Mayer, and not anyone else, is on trial, and he is on trial *only* for the offense charged in the Indictment, and not for anything else. You must return a unanimous verdict on the charge against him.

INSTRUCTION NO. 2 - PRELIMINARY MATTERS

Before I turn to specific instructions on the offense charged in this case, I will explain some terms to you.

Elements

An offense consists of “elements,” which are the parts of the offense. The prosecution must prove beyond a reasonable doubt all of the elements of the offense for you to find the defendant guilty of that offense.

Timing

The Indictment alleges an approximate date for the charged offense. The prosecution does not have to prove that the offense occurred on an exact date. It only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

* * *

I will now give you the “elements” instruction on the charged offense. The “elements” themselves are set out in **bold**.

INSTRUCTION NO. 3 - SEXUAL EXPLOITATION OF A CHILD

The Indictment charges defendant Mayer with “sexual exploitation of a child.” Defendant Mayer denies that he committed this offense.

For you to find defendant Mayer guilty of the charged offense, the prosecution must prove beyond a reasonable doubt *both* of the following elements against him:

One, in or between May 2008 and August 2008, the defendant persuaded, induced, or enticed a child under the age of 18 to engage in sexually explicit conduct for the purpose of producing a visual depiction of such sexually explicit conduct.

The child that the defendant persuaded, induced, or enticed to engage in sexually explicit conduct must have been under the age of 18, but the defendant did not have to know that she was under the age of 18.

The defendant “persuaded” a child if he urged or entreated her to engage in sexually explicit conduct. The defendant “induced” a child if he influenced or stimulated her to engage in sexually explicit conduct. The defendant “enticed” a child if he attracted her by offering pleasure or advantage, that is, he tempted her, to engage in sexually explicit conduct.

“Sexually explicit conduct” includes masturbation and lascivious exhibition of the genitals or pubic area of any person. Exhibition was “lascivious” if it was an openly or offensively sexual display. A “visual depiction” includes a photo or video produced with a cell phone. The defendant must have persuaded, induced, or enticed a child under the age of 18 to engage in sexually explicit

conduct for the purpose of producing at least one visual depiction of such sexually explicit conduct; there does not have to be more than one visual depiction. You must all agree which one or more of the visual depictions in question, if any, are of sexually explicit conduct and were the result of persuasion, inducement, or enticement by the defendant.

It is seldom, if ever, possible to determine directly what the defendant's purpose was. Thus, the defendant's purpose must be proved like anything else, from reasonable conclusions drawn from the evidence.

Two, one or more of the following occurred:

(a) the defendant caused one or more of the visual depictions of sexually explicit conduct to be produced using material that had been shipped or transported across state or international borders.

The Indictment charges that the material used to produce the visual depictions was an LG cell phone. The LG cell phone was manufactured in Korea and had been transported across state or international borders.

(b) the defendant knew or had reason to know that one or more of the visual depictions of sexually explicit conduct would be transported across state or international borders.

The defendant knew a fact if he was aware of it. The defendant had reason to know a fact if he knew other facts or circumstances from which he could reasonably have concluded that the fact in question was true. It is seldom, if ever, possible to determine directly what was in the defendant's mind. Thus, the defendant's knowledge must be proved like anything else, from reasonable

conclusions drawn from the evidence. The prosecution does not have to prove that the defendant knew that transporting the visual depictions in question across state or international borders was unlawful.

(c) one or more of the visual depictions of sexually explicit conduct were actually transported across state or international borders.

If you find beyond a reasonable doubt that a visual depiction in question was produced in a state other than Iowa and that the defendant possessed that visual depiction in the State of Iowa, then you may, but are not required to, find that the visual depiction was transported across a state border.

The prosecution does not have to prove all three alternatives for element *two* beyond a reasonable doubt, only one or more of those alternatives. However, you must all agree on which one or more alternatives have been proved beyond a reasonable doubt.

If the prosecution fails to prove both of these elements beyond a reasonable doubt, then you must find the defendant not guilty of the offense of “sexual exploitation of a child.”

**INSTRUCTION NO. 4 - PRESUMPTION OF INNOCENCE
AND BURDEN OF PROOF**

The defendant is presumed innocent and, thus, absolutely not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the defendant's arrest or charge or the fact that he is here in court. The presumption of innocence remains with the defendant throughout the trial. That presumption alone is enough for you to find the defendant not guilty. The presumption that the defendant is innocent may be overcome only if the prosecution proves, beyond a reasonable doubt, all of the elements of the offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt. The burden never, ever shifts to the defendant to prove his innocence. Thus, the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.

If the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.

Unless the prosecution proves beyond a reasonable doubt that the defendant has committed each and every element of the offense charged against him, you must find him not guilty of that offense.

INSTRUCTION NO. 5 - REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense, after careful and impartial consideration of all of the evidence in the case. “Proof beyond a reasonable doubt” is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs. The prosecution’s burden is heavy, but it does not require proof beyond all possible doubt.

A reasonable doubt may arise from the evidence produced by either the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence. A reasonable doubt may also arise from the prosecution’s lack of evidence.

INSTRUCTION NO. 6 - DEFINITION OF EVIDENCE

Evidence is

- Testimony
- Exhibits admitted into evidence
- Stipulations, which are agreements between the parties

If the parties stipulate that certain facts are true, then you must treat those facts as having been proved.

The law makes no distinction between “direct” and “circumstantial” evidence.

The weight to be given any evidence is for you to decide.

Some evidence may be admitted only for a limited purpose. I will tell you if that happens, and instruct you on the purposes for which the evidence can and cannot be used.

Just because an exhibit may be shown to you does not mean that it is more important than any other evidence.

The following are not evidence:

- Statements, arguments, questions, and comments by the lawyers

Lawyers are not witnesses. What they say during trial is not evidence. Lawyers may argue facts in support of their interpretation of the evidence, but if you remember facts differently, it is for you to decide which version of the facts is correct.

- Objections and rulings on objections

Lawyer may object when they believe a question or evidence is improper. Do not hold it against a lawyer or a party because the lawyer has made objections. When a lawyer objects to a question, you should not be influenced

by the question, the objection, or my ruling on the objection.

- Testimony that I tell you to disregard
- Anything that you see or hear about this case outside the courtroom.

The weight and quality of the evidence are for you to decide. The weight of the evidence may or may not depend on the number of witnesses who testify the same way or on the number of documents or exhibits. You are free to disbelieve any testimony, even if more than one witness testifies to the same or similar things. The weight of the evidence depends upon its quality, which is how convincing it is. For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness's testimony. Also, you are free to disbelieve any testimony that you do not find convincing.

INSTRUCTION NO. 7 - TESTIMONY OF WITNESSES

You may believe all of what a witness says, only part of it, or none of it. In evaluating testimony, consider the following:

- the witness's intelligence
- the witness's opportunity to see and hear what happened
- the witness's memory
- the witness's motives for testifying
- the witness's interest in the outcome of the case
- the witness's manner while testifying
- whether the witness said something different earlier
- the witness's drug or alcohol use or addiction, if any
- how reasonable the witness's testimony is
- how consistent the witness's testimony is with any other evidence that you believe, and
- any other factors that bear on believability or credibility.

In deciding whether or not to believe a witness, keep in mind that people sometimes see or hear things differently and sometimes forget things. Consider whether any differences in testimony result from innocent mistakes or from lies or phony memory lapses.

If the defendant testifies, you should judge his testimony in the same way that you judge the testimony of any other witness.

You should not give any more or less weight to a witness's testimony just because that witness works in law enforcement or is employed by the government.

You may hear expert testimony. You should consider expert testimony just like any other testimony. You may believe all of what an expert says, only part of it, or none of it.

Remember, it is your right to give any witness's testimony whatever weight you think it deserves.

INSTRUCTION NO. 8 - BENCH CONFERENCES AND RECESSES

I may need to talk with the lawyers out of your hearing, either by having a bench conference while you are present or by calling a recess. Please be patient, because while you are waiting, we are working. The purpose of these conferences is to avoid problems, so that the trial can run smoothly. I will do what I can to keep the number and length of these conferences to a minimum.

INSTRUCTION NO. 9 - NOTE-TAKING

You may take notes during the trial. If you take notes, you must still listen carefully to the evidence. Your notes are only a memory aid. They may be no more reliable than your memory or the memories of other jurors.

Do not discuss your notes with anyone until after closing arguments when you begin deliberations.

Leave your notes on your chair when the court is in recess. No one will read the notes, either during or after the trial. Please take your notes with you when you go to the jury room after closing arguments to begin your deliberations. After the verdict, you may take your notes out of the notebook and keep them, or they will be destroyed.

We do have an official court reporter taking down everything that is said, but transcripts will not be available for your use.

INSTRUCTION NO. 10 - CONDUCT OF THE JURY DURING TRIAL

You must decide this case solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. To ensure fairness, you must obey the following rules:

- Do not talk at all with the lawyers, the parties, or the witnesses.

Do not even pass the time of day with the lawyers, the parties, or the witnesses. Otherwise, a suspicion about your fairness could arise.

- Do not talk about the case with anyone until your jury service has been completed.

This means you cannot talk about the case with your family members, co-workers, friends, or employers. You cannot even talk about the case with your fellow jurors until after closing arguments when you begin your deliberations.

When I say do not talk to anyone, I also mean do not use any electronic device or media, such as a telephone, a cell or smart phone, Blackberry, PDA, computer; the Internet or any Internet service; any text or instant messaging service; or any Internet chat room, blog, or website, such as Facebook, MySpace, YouTube, Twitter, LinkedIn, Google Buzz, or Tagged, to communicate to or receive from *anyone* any information about this case until I accept your verdict.

You may, of course, tell family members, co-workers, friends, and employers that you are involved in a trial, so that you can tell them when you must be in court and warn them not to talk to you about the case.

- Do not do any research or listen to any news or comments about this case.

Do not do any research about this case on the Internet, in libraries, in newspapers, or in any other way. Do not read or listen to any news, information, gossip, or comments about this case, on the radio or TV, in print, on the Internet, in any “blog,” over the backyard fence, or in any public place. I assure you that, when you have heard all of the evidence, you will know more about this case than anyone will learn through the news media or any other source—and it will be more accurate.

- Do not make up your mind before deliberating.

Do not make up your mind about anything or anyone in this case until you have had a chance to discuss the evidence with your fellow jurors during your deliberations after closing arguments.

- Do not decide the case based on “implicit biases.”

As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on stereotypes, generalizations, gut feelings, or implicit biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

- Do tell the Court Security Officer (CSO) if you have a problem.

If at any time during the trial you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the CSO who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining two Instructions at the end of the evidence.

INSTRUCTION NO. 11 - DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you, but before you make that judgment, you must consult with one another and try to reach agreement, if you can do so consistent with your individual judgment.

Thus, if you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so. If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so. Don't give up your honest beliefs just because others think differently or because you simply want to get the case over with. On the other hand, do not hesitate to re-examine your own views and to change your opinion, if you are convinced that it is wrong. You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others and a willingness to re-examine your own views.

Again, the burden is on the prosecution to prove beyond a reasonable doubt all of the elements of the offense charged against the defendant. If the prosecution fails to do so, then you cannot find the defendant guilty of that offense. On the other hand, if the prosecution proves all of the elements of the offense charged against the defendant, then you must find the defendant guilty.

Remember, also, that the question is never whether the prosecution wins or loses the case; the prosecution, as well as society, always wins, whatever your verdict, when justice is done.

Finally, remember that you are not advocates, but judges of the facts. Your sole interest is to seek the truth from the evidence.

You may conduct your deliberations as you choose, but you must consider all of the evidence bearing on each question before you. You may take all the time that you feel is necessary.

INSTRUCTION NO. 12 - DUTY DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson.

The foreperson will preside over your discussions and speak for you here in court.

- Do not consider punishment.

Do not consider punishment of the defendant in any way in deciding whether the defendant is not guilty or guilty. If the defendant is guilty, I will decide what the defendant's sentence should be.

- Communicate with me through a CSO.

If you need to communicate with me during your deliberations, you may send a note to me through a Court Security Officer (CSO), signed by one or more of you. I will respond as soon as possible, either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

- Base your verdict solely on the evidence, reason, your common sense, and these instructions.

Nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.

- Reach your verdict without discrimination.

In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin,

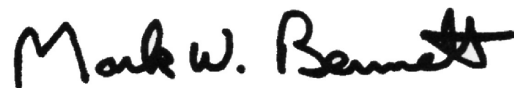
or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to the defendant's race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read the statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

- Complete the Verdict Form.

I am giving you the verdict form. A verdict form is simply a written notice of your decision. Again, you must return a unanimous verdict on the charge against the defendant. When you have reached a unanimous verdict on the charge against the defendant, your foreperson must complete one copy of the verdict form, and all of you must sign that copy to record your individual agreement with the verdict and to show that it is unanimous. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict. When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 25th day of October, 2010.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL MAYER,

Defendant.

No. CR 09-4051-MWB

VERDICT FORM

As to defendant Michael Mayer, we, the Jury, unanimously find as follows:

SEXUAL EXPLOITATION OF A CHILD		VERDICT
Step 1: Verdict	On the charge of “sexual exploitation of a child,” as charged in the Indictment and explained in Instruction No. 3, please mark your verdict.	<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty
Step 2: Alternatives	<i>If you found the defendant “guilty” of the charged offense in Step 1, please mark the alternative or alternatives for element two of the offense that you unanimously find beyond a reasonable doubt.</i>	
	<input type="checkbox"/> the defendant caused one or more of the visual depictions of sexually explicit conduct to be produced using material that had been shipped or transported across state or international borders.	
	<input type="checkbox"/> the defendant knew or had reason to know that one or more of the visual depictions of sexually explicit conduct would be transported across state or international borders	
	<input type="checkbox"/> one or more of the visual depictions of sexually explicit conduct were actually transported across state or international borders	

CERTIFICATION

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on each charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.
--

Date

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL MAYER,

Defendant.

No. CR 09-4051-MWB

**COURT’S PROPOSED
INSTRUCTIONS
TO THE JURY**

(10/22/10 “ANNOTATED”
REVISED VERSION)

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VERDICT FORM

INSTRUCTION NO. 12 - INTRODUCTION

Congratulations on your selection as a juror! These Instructions are to help you better understand the trial and your role in it. You must follow these instructions, and any other written or oral instructions that I give you during the trial, whether you agree with them or not.

In an Indictment, a Grand Jury has charged defendant Michael Mayer with “sexual exploitation of a child.” An Indictment is simply an accusation—it is not evidence of anything. Michael Mayer has pled not guilty, and he is presumed to be absolutely not guilty unless and until the prosecution proves his guilt beyond a reasonable doubt.

You must decide during your deliberations whether or not the prosecution has proved the guilt of the defendant beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, or stereotypes. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

Remember, only defendant Mayer, and not anyone else, is on trial, and he is on trial *only* for the offense charged in the Indictment, and not for anything else. You must return a unanimous verdict on the charge against him.

INSTRUCTION NO. 13 - PRELIMINARY MATTERS

Before I turn to specific instructions on the offense charged in this case, I will explain some terms to you.

Elements

An offense consists of “elements,” which are the parts of the offense. The prosecution must prove beyond a reasonable doubt all of the elements of the offense for you to find the defendant guilty of that offense.

Timing

The Indictment alleges an approximate date for the charged offense. The prosecution does not have to prove that the offense occurred on an exact date. It only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

* * *

I will now give you the “elements” instruction on the charged offense. The “elements” themselves are set out in **bold**.

INSTRUCTION NO. 14 - SEXUAL EXPLOITATION OF A CHILD

The Indictment charges defendant Mayer with “sexual exploitation of a child.” Defendant Mayer denies that he committed this offense.

For you to find defendant Mayer guilty of the charged offense, the prosecution must prove beyond a reasonable doubt *both* of the following elements¹ against him:

One, in or between May 2008 and August 2008, the defendant persuaded, induced, or enticed a child under the age of 18 to engage in sexually explicit conduct for the purpose of producing a visual depiction of such sexually explicit conduct.

The child that the defendant persuaded, induced, or enticed to engage in sexually explicit conduct must have been under the age of 18, but the defendant did not have to know that she was under the age of 18.²

The defendant “persuaded” a child if he urged or entreated her to engage in sexually explicit conduct. The defendant “induced” a child if he influenced or stimulated her to engage in sexually explicit conduct. The defendant “enticed” a child if he attracted her by offering pleasure

¹ Compare 9th Cir. Model 8.150 (2009) (treating the age of the victim as a separate element).

² *United States v. McCloud*, 590 F.3d 560, 566-68 (8th Cir. 2009) (§ 2251(a) has no mens rea requirement concerning the victims age and a defendant is not entitled to a reasonable-mistake-of-age defense); *United States v. Pliego*, 578 F.3d 938, 943-44 (8th Cir. 2009) (knowledge of the victim’s age is not an element of a § 2251(a) offense, or is lack of knowledge of the victim’s age an affirmative defense); *United States v. Wilson*, 565 F.3d 1059, 1067-68 (8th Cir. 2009) (same).

or advantage, that is, he tempted her, to engage in sexually explicit conduct.³

“Sexually explicit conduct” includes masturbation and lascivious exhibition of the genitals or pubic area of any person.⁴ Exhibition was “lascivious” if it was an openly or offensively sexual display.⁵ A “visual depiction” includes a photo or video produced with a cell phone.⁶ The defendant must have persuaded, induced, or

³ “Dictionary” definitions of “persuade,” “induce,” “entice,” and “coerce”; *see also United States v. Broxmeyer*, 616 F.3d 120, 125 (2d Cir. 2010) (“The terms ‘persuade,’ ‘induce,’ and ‘entice’ are not defined in § 2251(a), but they are ‘words of common usage that have plain and ordinary meanings,’ *United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007), and we look to the dictionary for their common definitions, *see VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 187 (2d Cir. 2010). ‘Persuade,’ ‘induce,’ and ‘entice’ are in effect synonyms. *See* The Random House Dictionary of the English Language 1076 (unabridged ed.1971). The idea conveyed is of one person ‘lead[ing] or mov[ing]’ another ‘by persuasion or influence, as to some action, state of mind, etc.’ or ‘to bring about, produce, or cause.’ *Id.* at 726 (defining ‘induce’); *see also id.* at 476 (defining ‘entice’ as ‘to draw on by exciting hope or desire; allure’); *id.* at 1076 (defining ‘persuade’ to mean ‘to prevail on (a person) to do something, as by advising, urging, etc.’ or ‘to induce to believe; convince’).

⁴ Limited to conduct identified as relevant in this case, for example, in the prosecution’s Trial Memorandum (docket no. 76), 2. *Compare* 8th Cir. Model 6.18.2252 & n.8 (“The term ‘sexually explicit conduct’ means actual or simulated [sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal], whether between persons of the same or opposite sex]; [bestiality] [masturbation] [sadistic or masochistic abuse]] [lascivious exhibition of the genitals or pubic area of any person].” (citing 18 U.S.C. § 2256(2)(A)).

⁵ Dictionary definition of “lascivious.”

⁶ Limited to the specific “visual depictions” identified as at issue in the prosecution’s Trial Memorandum (docket no. 76), 2, and the Indictment. *Compare* 8th Cir. Model 6.18.2252 & n.7 (“The term “visual depiction” includes [a] [any] [photograph] [film] [video] [picture] [or] [computer or computer-generated image or picture], whether
(continued...)

enticed a child under the age of 18 to engage in sexually explicit conduct for the purpose of producing at least one visual depiction of such sexually explicit conduct; there does not have to be more than one visual depiction. You must all agree which one or more of the visual depictions in question, if any, are of sexually explicit conduct and were the result of persuasion, inducement, or enticement by the defendant.

It is seldom, if ever, possible to determine directly what the defendant's purpose was. Thus, the defendant's purpose must be proved like anything else,⁷ from reasonable conclusions drawn from the evidence.

Two, one or more of the following occurred:

(a) the defendant caused one or more of the visual depictions of sexually explicit conduct to be produced using material that had been shipped or transported across state or international borders.

The Indictment charges that the material used to produce the visual depictions was an LG cell phone.⁸ The LG cell phone was manufactured in Korea and had been⁹ transported across state or international borders.

⁶ (...continued)
made or produced by electronic, mechanical, or other means. [It includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.] (citing 18 U.S.C. §§ 2256(5) and (8)).

⁷ Judge Bennett's "stock" instruction on proof of a mental state.

⁸ Indictment, **Count 1**.

⁹ Prosecution's Trial Memorandum (docket no. 76), Stipulations, ¶ 2.

(b) the defendant knew or had reason to know that one or more of the visual depictions of sexually explicit conduct would be transported across state or international borders.

The defendant knew a fact if he was aware of it. The defendant had reason to know a fact if he knew other facts or circumstances from which he could reasonably have concluded that the fact in question was true. It is seldom, if ever, possible to determine directly what was in the defendant's mind. Thus, the defendant's knowledge must be proved like anything else, from reasonable conclusions drawn from the evidence. The prosecution does not have to prove that the defendant knew that transporting the visual depictions in question across state or international borders was unlawful.¹⁰

(c) one or more of the visual depictions of sexually explicit conduct were actually transported across state or international borders.

If you find beyond a reasonable doubt that a visual depiction in question was produced in a state other than Iowa and that the defendant possessed that visual depiction in the State of Iowa, then you may, but are not required to, find that the visual depiction was transported across a state border.¹¹

The prosecution does not have to prove all three alternatives for element *two* beyond a reasonable doubt,

¹⁰ Judge Bennett's "stock" instruction with the addition of the explanation of "reason to know." *Compare* 8th Cir. Model 7.03.

¹¹ *Compare* 6.18.922A (explaining the inference of interstate transportation for a firearm).

only one or more of those alternatives. However, you must all agree on which one or more alternatives have been proved beyond a reasonable doubt.

If the prosecution fails to prove both of these elements beyond a reasonable doubt, then you must find the defendant not guilty of the offense of “sexual exploitation of a child.”

**INSTRUCTION NO. 15 - PRESUMPTION OF INNOCENCE
AND BURDEN OF PROOF**

The defendant is presumed innocent and, thus, absolutely not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the defendant's arrest or charge or the fact that he is here in court. The presumption of innocence remains with the defendant throughout the trial. That presumption alone is enough for you to find the defendant not guilty. The presumption that the defendant is innocent may be overcome only if the prosecution proves, beyond a reasonable doubt, all of the elements of the offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt. The burden never, ever shifts to the defendant to prove his innocence. Thus, the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.

If the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.

Unless the prosecution proves beyond a reasonable doubt that the defendant has committed each and every element of the offense charged against him, you must find him not guilty of that offense.

INSTRUCTION NO. 16 - REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense, after careful and impartial consideration of all of the evidence in the case. “Proof beyond a reasonable doubt” is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs. The prosecution’s burden is heavy, but it does not require proof beyond all possible doubt.

A reasonable doubt may arise from the evidence produced by either the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence. A reasonable doubt may also arise from the prosecution’s lack of evidence.

INSTRUCTION NO. 17 - DEFINITION OF EVIDENCE

Evidence is

- Testimony
- Exhibits admitted into evidence
- Stipulations, which are agreements between the parties

If the parties stipulate that certain facts are true, then you must treat those facts as having been proved.

The law makes no distinction between “direct” and “circumstantial” evidence.

The weight to be given any evidence is for you to decide.

Some evidence may be admitted only for a limited purpose. I will tell you if that happens, and instruct you on the purposes for which the evidence can and cannot be used.

Just because an exhibit may be shown to you does not mean that it is more important than any other evidence.

The following are not evidence:

- Statements, arguments, questions, and comments by the lawyers

Lawyers are not witnesses. What they say during trial is not evidence. Lawyers may argue facts in support of their interpretation of the evidence, but if you remember facts differently, it is for you to decide which version of the facts is correct.

- Objections and rulings on objections

Lawyers may object when they believe a question or evidence is improper. Do not hold it against a lawyer or a party because the lawyer has made objections. When a lawyers objects to a question, you should not be

influenced by the question, the objection, or my ruling on the objection.

- Testimony that I tell you to disregard
- Anything that you see or hear about this case outside the courtroom.

The weight and quality of the evidence are for you to decide. The weight of the evidence may or may not depend on the number of witnesses who testify the same way or on the number of documents or exhibits. You are free to disbelieve any testimony, even if more than one witness testifies to the same or similar things. The weight of the evidence depends upon its quality, which is how convincing it is. For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness's testimony. Also, you are free to disbelieve any testimony that you do not find convincing.

INSTRUCTION NO. 18 - TESTIMONY OF WITNESSES

You may believe all of what a witness says, only part of it, or none of it. In evaluating testimony, consider the following:

- the witness's intelligence
- the witness's opportunity to see and hear what happened
- the witness's memory
- the witness's motives for testifying
- the witness's interest in the outcome of the case
- the witness's manner while testifying
- whether the witness said something different earlier
- the witness's drug or alcohol use or addiction, if any
- how reasonable the witness's testimony is
- how consistent the witness's testimony is with any other evidence that you believe, and
- any other factors that bear on believability or credibility.

In deciding whether or not to believe a witness, keep in mind that people sometimes see or hear things differently and sometimes forget things. Consider whether any differences in testimony result from innocent mistakes or from lies or phony memory lapses.

If the defendant testifies, you should judge his testimony in the same way that you judge the testimony of any other witness.

You should not give any more or less weight to a witness's testimony just because that witness works in law enforcement or is employed by the government.

You may hear expert testimony. You should consider expert testimony just like any other testimony. You may believe all of what an expert says, only part of it, or none of it.

Remember, it is your right to give any witness's testimony whatever weight you think it deserves.

INSTRUCTION NO. 19 - BENCH CONFERENCES AND RECESSES

I may need to talk with the lawyers out of your hearing, either by having a bench conference while you are present or by calling a recess. Please be patient, because while you are waiting, we are working. The purpose of these conferences is to avoid problems, so that the trial can run smoothly. I will do what I can to keep the number and length of these conferences to a minimum.

INSTRUCTION NO. 20 - NOTE-TAKING

You may take notes during the trial. If you take notes, you must still listen carefully to the evidence. Your notes are only a memory aid. They may be no more reliable than your memory or the memories of other jurors.

Do not discuss your notes with anyone until after closing arguments when you begin deliberations.

Leave your notes on your chair when the court is in recess. No one will read the notes, either during or after the trial. Please take your notes with you when you go to the jury room after closing arguments to begin your deliberations. After the verdict, you may take your notes out of the notebook and keep them, or they will be destroyed.

We do have an official court reporter taking down everything that is said, but transcripts will not be available for your use.

INSTRUCTION NO. 21 - CONDUCT OF THE JURY DURING TRIAL

You must decide this case solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. To ensure fairness, you must obey the following rules:

- Do not talk at all with the lawyers, the parties, or the witnesses.

Do not even pass the time of day with the lawyers, the parties, or the witnesses. Otherwise, a suspicion about your fairness could arise.

- Do not talk about the case with anyone until your jury service has been completed.

This means you cannot talk about the case with your family members, co-workers, friends, or employers. You cannot even talk about the case with your fellow jurors until after closing arguments when you begin your deliberations.

When I say do not talk to anyone, I also mean do not use any electronic device or media, such as a telephone, a cell or smart phone, Blackberry, PDA, computer; the Internet or any Internet service; any text or instant messaging service; or any Internet chat room, blog, or website, such as Facebook, MySpace, YouTube, Twitter, LinkedIn, Google Buzz, or Tagged, to communicate to or receive from *anyone* any information about this case until I accept your verdict.

You may, of course, tell family members, co-workers, friends, and employers that you are involved in a trial, so that you can tell them when you must be in court and warn them not to talk to you about the case.

- Do not do any research or listen to any news or comments about this case.

Do not do any research about this case on the Internet, in libraries, in newspapers, or in any other way. Do not read or listen to any news, information, gossip, or comments about this case, on the radio or TV, in print, on the Internet, in any “blog,” over the backyard fence, or in any public place. I assure you that, when you have heard all of the evidence, you will know more about this case than anyone will learn through the news media or any other source—and it will be more accurate.

- Do not make up your mind before deliberating.

Do not make up your mind about anything or anyone in this case until you have had a chance to discuss the evidence with your fellow jurors during your deliberations after closing arguments.

- Do not decide the case based on “implicit biases.”

As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on stereotypes, generalizations, gut feelings, or implicit biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

- Do tell the Court Security Officer (CSO) if you have a problem.

If at any time during the trial you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the CSO who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining two Instructions at the end of the evidence.

INSTRUCTION NO. 22 - DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you, but before you make that judgment, you must consult with one another and try to reach agreement, if you can do so consistent with your individual judgment.

Thus, if you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so. If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so. Don't give up your honest beliefs just because others think differently or because you simply want to get the case over with. On the other hand, do not hesitate to re-examine your own views and to change your opinion, if you are convinced that it is wrong. You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others and a willingness to re-examine your own views.

Again, the burden is on the prosecution to prove beyond a reasonable doubt all of the elements of the offense charged against the defendant. If the prosecution fails to do so, then you cannot find the defendant guilty of that offense. On the other hand, if the prosecution proves all of the elements of the offense charged against the defendant, then you must find the defendant guilty.

Remember, also, that the question is never whether the prosecution wins or loses the case; the prosecution, as well as society, always wins, whatever your verdict, when justice is done.

Finally, remember that you are not advocates, but judges of the facts. Your sole interest is to seek the truth from the evidence.

You may conduct your deliberations as you choose, but you must consider all of the evidence bearing on each question before you. You may take all the time that you feel is necessary.

INSTRUCTION NO. 23 - DUTY DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson.

The foreperson will preside over your discussions and speak for you here in court.

- Do not consider punishment.

Do not consider punishment of the defendant in any way in deciding whether the defendant is not guilty or guilty. If the defendant is guilty, I will decide what the defendant's sentence should be.

- Communicate with me through a CSO.

If you need to communicate with me during your deliberations, you may send a note to me through a Court Security Officer (CSO), signed by one or more of you. I will respond as soon as possible, either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

- Base your verdict solely on the evidence, reason, your common sense, and these instructions.

Nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.

- Reach your verdict without discrimination.

In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin,

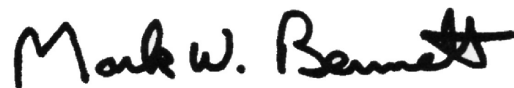
or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to the defendant's race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read the statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

- Complete the Verdict Form.

I am giving you the verdict form. A verdict form is simply a written notice of your decision. Again, you must return a unanimous verdict on the charge against the defendant. When you have reached a unanimous verdict on the charge against the defendant, your foreperson must complete one copy of the verdict form, and all of you must sign that copy to record your individual agreement with the verdict and to show that it is unanimous. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict. When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 25th day of October, 2010.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL MAYER,

Defendant.

No. CR 09-4051-MWB

**COURT'S PROPOSED
VERDICT FORM
(10/22/10 VERSION)**

As to defendant Michael Mayer, we, the Jury, unanimously find as follows:

SEXUAL EXPLOITATION OF A CHILD		VERDICT
Step 1: Verdict	On the charge of "sexual exploitation of a child," as charged in the Indictment and explained in Instruction No. 3, please mark your verdict.	<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty
Step 2: Alternatives	<i>If you found the defendant "guilty" of the charged offense in Step 1, please mark the alternative or alternatives for element two of the offense that you unanimously find beyond a reasonable doubt.</i>	
	<input type="checkbox"/> the defendant caused one or more of the visual depictions of sexually explicit conduct to be produced using material that had been shipped or transported across state or international borders.	
	<input type="checkbox"/> the defendant knew or had reason to know that one or more of the visual depictions of sexually explicit conduct would be transported across state or international borders	
	<input type="checkbox"/> one or more of the visual depictions of sexually explicit conduct were actually transported across state or international borders	

CERTIFICATION

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on each charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.
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Date

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

